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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/726,309	12/02/2003	David Andrew Dalton	9454	3111

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THE PROCTER & GAMBLE COMPANY
INTELLECTUAL PROPERTY DIVISION
WINTON HILL TECHNICAL CENTER - BOX 161
6110 CENTER HILL AVENUE
CINCINNATI, OH 45224

EXAMINER	
DONOVAN, MAUREEN C	
ART UNIT	PAPER NUMBER

1761

DATE MAILED: 03/24/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/726,309

Applicant(s)

DALTON ET AL.

Examiner

Maureen C Donovan

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM
THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-20 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 26 January 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date ____.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: ____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

1. Claims 1,4,5,11-20 are rejected under 35 U.S.C. 102(b) as being anticipated by Hargraves, US patent number 4 966 780.

Hargraves discloses a packaging system (see Column 1, lines 13-24) comprising a container having a longitudinal axis and comprising a closed bottom, an open top, and a body having an enclosed perimeter between said bottom and said top; wherein said bottom, top, and body together define an interior volume (see Figure 4, reference numbers 352, 340 and 300); a protuberance continuously disposed around the perimeter of said body proximate to said top wherein said protuberance forms a ridge external to said body, perpendicular to the longitudinal axis of the container (see Figure 4, reference number 315 and Column 13, lines 43-45 and Column 12, lines 49-50); a flexible closure removably attached and sealed to said protuberance (see Column 14, lines 1-14 and Figure 5A and 5B and Column 12, lines 3-6). Hargraves discloses that the bottom and body are constructed from oriented polyester (see Column 15, lines 20-25), which is a material that has a tensile modulus number ranging from at least about 35,000 pounds per square inch (2,381 atm) to at least about 650,000 pounds per square inch (44,230 atm) as evidenced by Mark's Standard Handbook for Mechanical Engineers (10th Edition) (page 7, line 61, column 3). Note that since the container is of a structure and a material that meets the claimed limitations, one of ordinary skill in the art would expect the container of the prior art to inherently have a top load capacity of at least 16 pounds or even at least 48 pounds. Hargraves discloses that the flexible closure has a one-way valve disposed thereon (see Column 11, lines 45-51 and Column 12, lines 7-8). Hargraves discloses that the bottom and body of the container are formed from a blow-moldable material (Column 15, lines 20-22) wherein polyester is a blow-moldable material as evidenced by "The Blow Molding Process" (page 2, Materials

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paragraph, lines 1-3) and the blow-moldable material is polyethylene terephthalate (polyester). Hargraves discloses that the container is blow molded, wherein Hargraves discloses that the container is “blown” which is interpreted to mean blow-molded (see Column 17, lines 33-41). Hargraves discloses a packaging system that has an overcap, constructed from polypropylene, wherein the overcap has a dome portion with a protuberance thereon that matingly engages with a second protuberance on the body of the container (see Figure 3, reference number 3201 and Column 11, lines 1-8). Hargraves discloses that the body has at least one region of deflection disposed thereon responsive to at least one force internal or external to said container (see Column 5, lines 61-68). Hargraves discloses placing coffee in the packaging system, wherein coffee is roast and ground (see Column 7, lines 21-26).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
 2. Ascertaining the differences between the prior art and the claims at issue.
 3. Resolving the level of ordinary skill in the pertinent art.
 4. Considering objective evidence present in the application indicating obviousness or nonobviousness.
2. Claims 2-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hargraves as applied to claims 1,4,5,11-20 above and further in view of Genske, US patent number 5,160,767.

Hargraves discloses all the features of the instantly claimed invention except for that the flexible closure is a laminate and that the laminate comprises a foil.

Genske teaches a flexible closure that can be removably attached and sealed to a packaging container. The closure of Genske is a laminate structure comprising a barrier layer. Genske also teaches the use of a metal foil in the laminate structure (see Column 3, lines 64-68; Column 4, lines 1-50 and Column 6, lines 26-41).

It would have been obvious to one of ordinary skill in the art at the time of the invention to use the closure material as taught by Genske for the closure as disclosed by Hargraves since both are directed to food containers and since the closure of Genske will provide a closure that can be easily removed without undue force but that still provides a tight seal during severe conditions and provides a barrier to light and oxygen without opening and prematurely releasing the container contents (see Genske, Column 1, lines 44-59; Column 2, lines 1-22).

1. Claims 8-10 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hargraves as applied to claims 1,4,5,11-20 above and further in view of Ota, US patent number 4 890 752.

Hargraves discloses all the features of the instantly claimed invention except for the container having a handle.

Ota teaches a plastic container wherein said body has a handle disposed thereon (see Figures 1-5, Column 3, lines 31-38 and 13-16), the handle being integral with said body (see Column 2, lines 35-56 Figures 1-5) and wherein the handle is substantially parallel to said longitudinal axis of said container (see Ota Figures 1-5).

It would have been obvious to one of ordinary skill in the art at the time of the invention to put a handle as taught by Ota on the container as disclosed by Hargraves since both are directed containers for food and since the handle of Ota to aid in holding the container without deforming the container (see Ota, Column 1, lines 36-68 and Column 2, lines 1-2).

2. Claims 6-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hargraves as applied to claims 1,4,5,11-20 above and further in view of Haas, US patent number 5 085 034.

Hargraves discloses all the features of the instantly claimed invention except for the container being made of a multilayered material.

Haas teaches a packaging system for oxygen sensitive food with a container that is multilayered with an oxygen barrier layer (see Column 2, lines 26-33).

It would have been obvious to one of ordinary skill in the art at the time of the invention to use a material as taught by Haas for the container as disclosed by Hargraves since both are directed to food containers and since the container of Haas is adapted for use in packaging a food product subject to change on exposure to oxygen (see Column 1, lines 39-52 and 62-68), which coffee is and since the material of Haas would extend the shelf life of the product.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

3. Claims 1-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-38 of copending Application No. 10/155338. Although the conflicting claims are not identical, they are not patentably distinct from each other because both applications claim a container with the same structural and compositional limitations, the container as claimed in Application 10/155338 encompassing the instantly claimed invention.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.



**KEITH HENDRICKS
PRIMARY EXAMINER**